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No. 80-2134

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

FOREMOST INSURANCE COMPANY AND SHIRLEY ELISER,

Petitioners,

V.

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON AND JUNE G. ALLEN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JUNE 15, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

ORTLIEB PRESS BATON ROUGE

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RELEVANT DOCKET ENTRIES

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

Date	NR.	Proceedings
9/13/76—	1	COMPLAINT . . . issuing 3 summonses
11/ 1/76—	5	Plaintiffs' interrogatories to Foremost Insurance Company and Shirley Eliser.
11/11/76—	6	Interrogatories propounded to plaintiffs by defendants.
12/10/76—	11	Defendants' ANSWER TO INTERROGATORIES.
12/15/76—	15	Plaintiffs' ANSWERS to Interrogatories.
6/60/77—	17	Answer of June G. Allen to complaint, counterclaim against Clyde Richardson, and Crossclaim Shirley Eliserand Foremost Insurance Co.
7/ 7/77—	18	Plaintiff's answer to counterclaim of June G. Allen.
7/ 8/77—	19	Motion of Foremost Insurance Company and Shirley Eliser to Strike and Notice of Hearing 8/5/77.
7/18/77—	20	June G. Allen request for admissions.
7/25/77—	23	Motion of June Allen for amendment of crosscomplaint and notice of hearing 8/5/77.
8/ 2/77—	24	Foremost Insurance Co., response to request for admissions . . . entg. 8/4/77.
8/11/77—	25	M.E. . . . EGW . . . on motion of deft. June G. Allen to amend her cross claim and counterclaim to include allegation of diversity jurisdiction and request for trial by jury . . . ORDERED motion to amend complaint to allege diversity jurisdiction and request trial by jury DENIED . . . ORDERED . . . motion of Fore-

	most Insurance Company and Shirley Eliser to strike original complaint, the demand and prayer for trial by jury GRANTED . . . issuing notice entg. 8/16/77.
10/ 3/77—27	MANDAMUS . . . FIFTH CIRCUIT . . . ORDERED . . . petition for writ of mandamus DENIED . . . issuing notice . . . entg. 10/4/77.
10/ 4/77—28	June Allen Interrogatories (missing).
10/ 5/77—29	June Allen's notice of her cross-claim against Shirley Eliser and Foremost Insurance Company without prejudice . . . entg. 10/6/77.
10/14/77—30	Answer of Foremost Insurance Company and Shirley Eliser.
8/11/78—33	M.E. . . . FJP . . . Court finds no basis for admiralty jurisdiction . . . Court reserves right to review jurisdictional issue . . . issuing notice . . . entg 8/16/78.
8/14/78—34	M.E. . . . FJP . . . STATUS CONFERENCE . . . ORDERED . . . on or before 4/7/78 parties file memo of documentary evidence on whether Court has admiralty jurisdiction . . . FURTHER . . . case placed on final pre-trial docket . . . issuing notice . . . entg. 8/16/78.
2/29/79—37A	Exhibits in support of Admiralty Jurisdiction (Pltf.).
5/23/79—51	OPINION . . . EGW . . . issuing notice . . . 6/4/79.
5/23/79—52	OPINION . . . EGW . . . issuing notice . . . entg. 6/4/79.
6/19/79—53	Notice of Appeal of defdts.
6/21/79—54	Notice of Appeal of June G. Allen, defdt. and counter-claimant.
5/15/81—56	MANDATE . . . Judgment of District Court is REVERSED & REMANDED to USDC . . . FURTHER ORDERED . . . defts.-appellees pay to pltfs.-appellants the costs on appeal.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

4/28/80	Oral argument before Thornberry, Anderson and Thomas A. Clark, Circuit Judges.
4/28/80	Minute Entry: Court suggested that counsel should file letter with the Clerk commenting on 608 Fed.2nd 123.
5/ 1/80	Filing Appellees letter dated 4/29/80 submitted as supplement to oral argument. (CE)
5/ 7/80	Filing letter dated 5/5/80 of appellee, Allen, citing Fifth Circuit decision. (CE)
4/ 2/81	Opinion rendered.
4/15/81	Petitions for Rehearing - Regular and En Banc.
5/ 4/81	Orders Denying Rehearing (without polling).
6/24/81	Notice of Filing of Petition for Certiorari on 6/15/81.
10/ 9/81	Order of Supreme Court granted 10/5/81.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA
BATON ROUGE, LOUISIANA

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON and CARLA RICHARDSON **NUMBER 76-280**

VERSUS

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN **JURY REQUESTED**

* * * * *

1.

Plaintiffs reside at General Delivery, Brittany, Louisiana 70718; Foremost Insurance Company is a foreign Insurance Company domiciled in a state other than Louisiana, but doing business in the State of Louisiana; Shirley Eliser resides at Rt. 4, Box 263, Gonzales, Louisiana; June G. Allen resides at P. O. Box 136, Trailerland Trailer Park, Prairieville, Louisiana; Jurisdiction is conferred by virtue of the fact that the accident happened on navigable waters in this state.

2.

Pansy F. Richardson is the surviving wife of Clyde Richardson; Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson are major children and issue of the marriage of Pansy F. Richardson and Clyde Richardson.

3.

On April 25, 1976 Clyde Richardson was killed in a boating accident which occurred on the Amite River approximate-

ly one-half to three-fourths miles below the French Settlement Bridge due to the combined concurrent, joint negligence of Shirley Eliser and June G. Allen; at the time of the accident Foremost Insurance Company insured Shirley Eliser. Pansy F. Richardson desires and is entitled to the sum of One Hundred Fifty Thousand Dollars ($150,000) as damages for the untimely death of her husband.

4.

The major children, plaintiffs therein, desire and are entitled to the sum of Twenty-Five Thousand Dollars ($35,000) each as damages for the untimely death of their father.

WHEREFORE, plaintiffs pray for judgment insolido against Foremost Insurance Company, Shirley Eliser, and June G. Allen in the Following amounts:

Pansy F. Richardson—One Hundred Fifty Thousand Dollars ($150,000)

Donald B. Richardson—Thirty-Five Thousand Dollars ($35,000)

Patrick S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Joseph S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Larry S. Richardson—Thirty-Five Thousand Dollars ($35,000)

Carla Richardson—Thirty-Five Thousand Dollars ($35,000)

Plaintiffs further pray for trial by jury.

Respectfully submitted,

Roy Maughan, Ltd.
1755 Wooddale Boulevard
Baton Rouge, Louisiana 70806
Telephone: (504) 926-8533

BY: /s/Roy Maughan
Roy Maughan

(CAPTION OMITTED IN PRINTING)

NUMBER 76-280

ANSWER, COUNTERCLAIM, and CROSS-CLAIM OF JUNE G. ALLEN

NOW INTO COURT, through undersigned counsel, comes JUNE G. ALLEN, purportedly made respondent herein, and for answer to the complaint of Pansy F. Richardson, et als, filed herein, denies each and every allegation of that complaint, except such thereof as may be expressly admitted in this Answer.

FIRST DEFENSE

The complaint fails to state a claim against this respondent upon which relief can be granted.

SECOND DEFENSE

Further answering said complaint categorically, respondent avers, alleges and pleads as follows:

1.

Respondent admits all allegations of Paragraph 1 of plaintiffs' complaint, except as to the residence of June Allen.

2.

For lack of sufficient information to justify a belief thereof, respondent denies the allegations of Paragraph 2.

3.

Respondent admits that on April 25, 1976, Clyde Richardson was killed in a boating accident which occurred on the Amite River approximately one-half to three-fourths miles below the French Settlement Bridge and further admits that

at the time of this accident, Foremost Insurance Company insured Shirley Eliser. Further answering Paragraph 3, defendant denies all remaining allegations of Paragraph 3.

4.

Respondent denies all allegations of Paragraph 4.

COUNTERCLAIM

June Allen now assumes the position of complainant for purposes of this Counterclaim and respectfully represents that:

1.

The following parties are made defendants in this counterclaim:

Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, all of whom reside at General Delivery, Brittany, Louisiana 70718.

2.

On April 25, 1976, June Allen was a passenger in a boat being driven by Clyde Richardson on the Amite River.

3.

When Richardson approached a point approximately one-half to three-fourths miles below the French Settlement Bridge on said river, his boat collided with a boat being driven in the opposite direction by Shirley Eliser.

4.

The above described accident was caused solely by the combined, concurrent, and joint negligence of Shirley Eliser and Clyde Richardson in the following described particulars:

A. Both parties failed to keep a proper lookout;

B. Both parties failed to observe all applicable rules of the road;

C. Both parties were driving their respective watercraft in a negligent and reckless manner;

D. Both parties failed to maintain control of their watercraft;

E. Both parties committed other acts of negligence which will be proved at the trial of this matter or which are solely within their own knowledge at the present time.

5.

As a result of the above described accident, June Allen suffered severe and painful personal injuries, including, but not limited to, the following: injuries to her jaw, heart, and teeth. As a result of the foregoing injuries, June Allen is entitled to the full sum of TWO HUNDRED FIFTH THOUSAND AND NO/100 ($250,000) DOLLARS.

6.

June Allen alleges that respondents unconditionally accepted the Succession of Clyde Richardson in the proceedings entitled "Succession of Clyde Richardson, Probate Number 6140, 23rd Judicial District Court, Parish of Ascension; as a result of this unconditional acceptance, respondents are liable to June Allen for all damages caused by the negligence of the deceased, Clyde Richardson.

CROSS-CLAIM

June Allen now assumes the position of cross-claimant, and for purposes of this cross-claim respectfully represents that:

1.

The following parties are made defendants in this cross-claim:

A. Shirley Eliser, who is domiciled in the Parish of Ascension and resides at Route 4, Box 263, Gonzales, Louisiana;

B. Foremost Insurance Company, a Michigan insurance company domiciled in Grand Rapids, Michigan and licensed to do business and doing business in the State of Louisiana.

2.

June Allen incorporates by reference paragraphs 2 through 5 of the counterclaim outlined hereinabove as though said paragraphs were set forth in full herein.

3.

June Allen respectfully represents that Shirley Eliser and the Foremost Insurance Company are jointly and solidarily liable with the respondents in the aforementioned counterclaim for all damages outlined in said counterclaim hereinabove.

4.

June Allen further alleges and avers that on the date of the above described accident, there was in existence and effect a policy of liability insurance issued to Shirley Eliser by Foremost Insurance Company which provided liability insurance protection and coverage for all of the damages sustained by June Allen herein.

WHEREFORE, June Allen prays for judgment:

I. On the main demand, rejecting the demand of Pansy F. Richardson, Donald B. Richardson, Patrick F. Richardson,

Joseph S. Richardson, Larry S. Richardson and Carla Richardson and assessing the costs of this proceeding against the said complainants;

II. On the counterclaim and cross-claim demands, in favor of June Allen and against Shirley Eliser, Foremost Insurance Co., Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson in the full sum of TWO HUNDRED FIFTY THOUSAND AND NO/100 ($250,000) DOLLARS, together with legal interest thereon from date of judicial demand and for all costs of these proceedings.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, LA 70346

BY: /s/Victor Marcello

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION
NUMBER: 76-280

ANSWER

The answer of Foremost Insurance Company and Shirley Eliser, sought to be made defendants herein, with respect represent that:

FIRST DEFENSE

This court lacks jurisdiction over the subject matter of this litigation.

SECOND DEFENSE

The complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

And now answering the numbered paragraphs of the complaint, these defendants deny each and every allegation contained therein except those which may be hereinafter specifically admitted.

And now further answering the allegations of the numbered paragraphs of the complaint, with respect, represent that:

1.

These defendants admit their domicile and status but deny the other allegations contained in Paragraph 1 of the complaint for lack of sufficient information to justify a belief.

2.

The allegations contained in Paragraph 2 of the complaint are denied for lack of sufficient information to justify a belief.

3.

For answer to the allegations contained in Paragraph 3 these defendants admit that Clyde Richardson was killed in a boating collision but deny the other allegations contained in Paragraph 3 of the complaint as written.

4.

The allegations contained in Paragraph 4 of the complaint are denied.

FOURTH DEFENSE

This cause does not fall within this Honorable Court's admiralty jurisdiction.

FIFTH DEFENSE

In the alternative event that this court finds it has jurisdiction over this claim then defendants aver that the sole cause of the collision was the negligence, improper navigation and poor seamanship of June G. Allen in that she was operating the boat while under the influence of alcohol, operating the boat when she knew she was unskilled in its operation and did not know how to properly and safely operate the craft, failed to keep to the right side of the stream, failed to heed oncoming boat traffic and was otherwise negligent.

SIXTH DEFENSE

In the further alternative, Clyde Richardson was guilty of negligence which contributed to his death and which bars

claimant's right to recovery in that he allowed June Allen to operate his boat when he knew she could not properly operate the vessel and was unskilled to do so, allowing himself to become intoxicated so that he could not operate the vessel, failed to properly instruct June Allen in the operation of the vessel and was otherwise negligent, and thus, any judgment which claimants may be entitled to recover should be reduced accordingly.

SEVENTH DEFENSE

In the further alternative, June G. Allen and Clyde Richardson were on a joint venture and had equal control over the operation of the boat and thus the negligence of June Allen is imputed to Clyde Richardson and his heirs in bar of his right to recovery, or should otherwise reduce the judgment.

WHEREFORE, Foremost Insurance Company and Shirley Eliser pray that this answer be deemed good and sufficient and that after all due proceedings had that there be judgment in their favor and against the complainants, dismissing the complaint at their costs, and for all other equitable relief.

By Attorneys:

FRANKLIN, MOORE & WALSH
P. O. Box 3958
Baton Rouge, Louisiana 70821
(504) 383-2608

ARTHUR H. ANDREWS

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION NO. 76-280

NOTICE OF DISMISSAL OF ACTION

TO: Mr. Arthur H. Andrews
P. O. Box 3958
Baton Rouge, Louisiana

Mr. Dorsey C. Martin, III
1755 Wooddale Blvd.
Baton Rouge, Louisiana 70806

Please take notice that the defendant, June G. Allen, dismisses her cross-claim filed herein against Shirley Eliser and Foremost Insurance Company, without prejudice.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, Louisiana 70346

BY: /s/Victor Marcello

(Certificate omitted in printing)

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
MARCH 14, 1978
POLOZOLA, M.

PANSY F. RICHARDSON, ET AL.

VERSUS

CIVIL ACTION
NUMBER 76-280

FOREMOST INSURANCE COMPANY, ET AL.

Status conference was held this date.

PRESENT: Roy Maughan, Esq.
Attorney for Plaintiff

Arthur H. Andrews, Esq.
Attorney for Foremost Ins. Co., et al.

Victor L. Marcello, Esq.
Attorney for June G. Allen

The Court having questioned the jurisdiction of the Court herein:

IT IS ORDERED that on or April 7, 1978, the parties shall file a memorandum and documentary evidence on whether the Court has admiralty jurisdiction.

IT IS FURTHER ORDERED that this case be placed on the final pre-trial docket.

UNITED STATES MAGISTRATE

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

MINUTE ENTRY:
AUGUST 11, 1978
POLOZOLA, M.

PANSY F. FICHARDSON, ET AL.

VERSUS

CIVIL ACTION
NUMBER 76-280

FOREMOST INSURANCE COMPANY, ET AL.

This suit arises out of a collision between two pleasure boats on the Amite River. At a status conference held before the United States Magistrate, the Court questioned the jurisdiction of the Court in this case. The parties were ordered to file briefs and documentary evidence on the issue. The Court has now reviewed the briefs and the factual evidence submitted by the parties.

While the evidence submitted by the parties was far from being complete, the Court finds that based on the evidence in the record at this time, the Court does have admiralty jurisdiction herein.

The Court reserves its right to again review the jurisdictional issue when the facts of this case are fully presented to the Court.

UNITED STATES MAGISTRATE

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson

v.

FOREMOST INSURANCE COMPANY,

Shirley Eliser and June G. Allen

Civ. A. No. 76-280

United States District Court, M.D. Louisiana

May 23, 1979

E. GORDON WEST, District Judge:

The sole issue before the court is whether or not, under the admitted facts i nthis case, this court is vested with "admiralty jurisdiction." The incident giving rise to this litigation involved a collision between two "pleasure" boats. One was an eighteen foot pleasure boat powered by a 185 h.p. Johnson outboard motor that was being used for water skiing purposes at the time of the accident. The other was a sixteen foot "bass boat" powered by an outboard motor that was used exclusively for pleasure fishing. At the time of the accident the two boats were headed in opposite directions on the Amite River. The point of impact was in a curve some one-half to three-quarters of a mile downstream from the French Settlement bridge. The bass boat was proceeding northward and apparently made a left turn into the path of the southbound ski boat.

Assuming, for the purpose of this opinion, that the Amite River, at the point of collision, is "navigable", the dispositive issue, in this case, is whether or not there is a "sufficient

relationship to traditional maritime activity" to warrant the extension of admiralty jurisdiction to this litigation.

For the reasons hereinafter set forth, we conclude that under the facts of this case this court is not vested with admiralty jurisdiction.

The following facts are undisputed:

(1) One boat was used for pleasure boating, such as boat riding and water skiing, and at the time of the accident the boat was actually pulling a skier on a zip sled;

(2) The other boat was used exclusively for pleasure fishing and was described as a bass boat;

(3) Neither boat had ever been used in an "commercial maritime activity" before the accident;

(4) At the time of the accident neither boat was involved in any "commercial maritime activity" of any sort;

(5) Neither of the two drivers of the boat were being paid to operate the boat nor was this activity in any way a part of their regular type of employment;

(6) None of the passengers on either boat were engaged in any kind of "traditional maritime activity" either before or at the time of the accident;

(7) Neither of the boats involved were under hire in any traditional maritime form;

(8) There is no evidence to indicate that any "commercial activity", even in the broadest admiralty sense, had ever been previously engaged in by

either of the boats in question, and in fact the two boats would have to be classified as "purely pleasure craft", not in any way "involved in commerce"; and,

(9) There was no other instrumentality involved in this accident that had even a minor relationship to "admiralty" or "commerce", i.e. a buoy, barge, oil drilling apparatus, etc.

In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

In our analysis it must first be noted that some of the most respected admiralty commentators lean heavily toward the stand now taken by this court that this particular case is not one which was meant to be covered by the admiralty jurisdiction of the federal courts.

Professors Gilmore and Black state the following in their treatist, *The Law of Admiralty*, Second Edition:

"The following are doubtful areas, (for invoking admiralty jurisdiction) where generalization is dangerous:

Torts occurring on navigable waters, but having no other maritime connection." (*The Law of Admiralty*, Second Edition, pp. 27, 28; parenthesis added)

However, Professors Gilmore and Black do not stop here. Their treatise contains numerous quotes aimed at the very heart of this case at bar; such as:

"In the main, the outlines of the jurisdiction seem to have been pretty well drawn. Its evaluation requires the balancing of two factors pulling in opposite directions. First, if there is any sense at all in having a separate basis for admiralty jurisdiction in the federal courts, it must be because there is a federal interest that can best be implemented by thus dealing with the major concerns of the *shipping industry* — with all of them, and not just with a few of them selected on antiquarian criteria."

"Whether a given inclusion within or exclusion from the jurisdiction is warranted must depend on the general sense and policy of having the jurisdiction at all. It is hard to think of any better reason for having this jurisdiction than its aptness for providing a special-industry court for the *maritime industry*. If this is right, then some modern decisions wander far off the mark. One thinks of the cases bringing airplane accidents within the jurisdiction, just because the plane happens to crash on navigable waters, and the inclusion of such mishaps as surfboard accidents, or *motorboat accidents* on lakes substantially landlocked. *Happily, these cases have* (to some not yet certain extent) *been overruled, at the highest level. It may be hoped that this overruling is thoroughly general . . . Ideally, the jurisdiction out* (sic) *to include those and only those things principally connected with maritime transportation. Summarily, the lower courts have been over-inclusive as to torts,* and under-inclusive as to contracts." (*The Law of Admiralty,* Second Edition, pp. 29-31; emphasis added)

Benedict on Admiralty, Seventh Edition (Revised), is another important treatise in which several selected quotes would strongly indicate that the particular facts in this case do not merit the extension of admiralty jurisdiction:

". . . maritime law is not a monistic system. Where, although a matter is maritime, there may be over-

whelming considerations requiring state regulation and if such state law does not disturb the general uniformity of maritime law, its application to cases 'maritime but local' will be valid. It is not always easy in borderline cases to determine how the accommodation between state and federal concern should be made. One distinction appears to be that where obligations are imposed by virtue of the authority of state or Federal government, the court must attempt to balance the interests, but where the obligations are assumed voluntarily, as in a contract, they ought to be judged by the law applying to the real nature of the transaction." (*Benedict on Admiralty*, Seventh Edition (Revised) Section 127, pp. 8-47 thru 8-49)

Louisiana, with its roots sunk deeply into the maritime arena, has been one of the leading states in the molding and shaping of the constraints of admiralty jurisdiction. In a recently published book on this subject several noted Louisiana attorneys spoke about the factual situation which now presents itself to this court:

"The second constructive reduction of the admiralty jurisditcion is the *requirement of a maritime connection along with the locus of the accident to support maritime jurisdiction. . . .* The court mentioned that in the Fifth Circuit's decision in *Watts v. Zapata Offshore Co.*, it had been said that only minimal maritime connection was required once you had the sufficient maritime locus.

"What, then, were the considerations of whether there was sufficient maritime connection for this accident. The *Peytavin* court, in finding there was not sufficient maritime connection in that case pointed out that neither the parties, nor the nature, nor the apparent cause of the accident, nor the injury sustained demonstrated any further connection with maritime interests. It is necessary to keep in mind

what considerations are involved in the determination of "maritime connections."

"As a result, *now not only do you have to have the locus, you need the pure maritime connection for admiralty jurisdiction.*

"The district courts are going to have a struggle too, because it would appear that they must now come to grips with something previously unheard of: *maritime connexity as an adjunct to the locus theory.*" (Recent Development in the Law of Maritime Torts, edited by Boland and Dodd; pp. 22-26 (1972))

The foregoing analysis leads us directly to two cases which must be closely examined by this court. *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454, 1973 AMC 1(1972); and *Kelly v. Smith,* 485 F.2d 520, 1973 AMC 2478 (CA 5-1973).

In *Executive Jet* the United States Supreme Court recognized the time honored rule that the "locality" of the wrong was traditionally the deciding point in whether or not admiralty jurisdiction was present. However, in an in-depth review of prior jurisprudence the court recalled some serious difficulties with the blind application of the locality test. Based on this the court stated:

"In sum, there has existed over the years a judicial, legislative, and scholarly recognition that, in determining whether there is admiralty jurisdiction over a particular tort or class of torts, reliance on the relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." (93 S.Ct. at 501)

Of course, *Executive Jet* dealt with an aircraft accident.

This is not the situation in the case at bar. However, the principles of *Executive Jet*, and more importantly its progeny, will have an impact on this case.

Likewise, in *Kelly v. Smith*, supra, the Fifth Circuit recognized the absurdity of applying the "strict locality test", and stated:

> "The analysis and thrust of *Executive Jet*, coupled with our decision in *Peytavin*, dictate the conclusions that maritime locality alone is no longer sufficient to sustain maritime jurisdiction, and that the wrong must bear a significant relationship to maritime activity." (485 F.2d at 524)

The court in *Kelly* was steadfast in adhering to a policy whereby some significant relationship to a recognized maritime activity was required before admiralty jurisdiction would be invoked. (see generally 485 F.2d at 524).

With these two cases as a backdrop, our examination continues with the "locality plus" test that was discussed in *Kelly v. Smith*, supra. The court in *Kelly* stated that it must "look to all the circumstances for a substantial maritime relationship. Both *Peytavin* and *Executive Jet* offer guidelines for the determination." (485 F.2d at 525) The court then went on to list certain factors in that case which caused it to invoke the admiralty jurisdiction:

> "From the facts and analysis of *Executive Jet* and *Peytavin* we can discern factors to be considered in the circumstances before us: the functions and roles of the parties; the types of vehicles and instrumentalities involved; the causation and the type of injury; and traditional concepts of the role of admiralty law." (485 F.2d at 525)

The Fifth Circuit concluded its analysis with the state-

ment that: "Policy militates toward admiralty jurisdiction in this case." (485 F.2d at 526) It is not clear how much of the "policy" involved dealt with the fact that the plaintiffs in *Kelly* would have been barred due to the applicable state prescriptive period as opposed to the doctrine of laches used in admiralty. However, it did play some part. (see generally 485 F.2d at 526) The prescription versus laches argument is not present in the instant case since suit was filed well before one year elapsed from the date of the accident.

Most importantly to this case, the discussion in the *Kelly* case indicated that there was either some "commercial activity" or some "traditional maritime connection" present to invoke admiralty jurisdiction. It seems clear from the facts in *Kelly* that the case dealt, at least to some degree, with what this court might term "piracy" in that the plaintiffs were admittedly poaching on the land which the defendant, J. C. Smith, had been hired to protect.

When the location of the injury is on or in a navigable waterway, the requirement of a "traditional maritime connection" becomes less stringent. In *Kelly v. Smith*, supra, the poaching or piracy, with its commensurate miniwar between the parties in a stretch of the Mississippi River which is conclusively navigable, was enough to trigger the admiralty jurisdiction of the federal court. However, in the case at bar this court can find no "traditional maritime connection" between the injuries received and the location of the tort. Admiralty jurisdiction was created to serve the commercial shipping industry's interests by providing a stable and constant body of law which is to be used in the resolution of litigation arising between those people actually engaged in it. The tremendous increase in the number of small pleasure boats, whether for skiing or pleasure fishing, is a contemporary problem. When the owners of these watercrafts have absolutely no

commercial or traditional maritime interests which require the protection of the admiralty side of the federal judiciary, then admiralty jurisdiction should be withheld. In this context Professor Stoltz feels that the operation of small pleasure craft is so "local" in nature that a uniform body of law is a detriment and that instead, the jurisdiction of these cases should be transferred to the states. Professor Stoltz stated:

> ". . . where commerce stops, the need for uniformity also ends. If commerce is not involved, there is no national interest in uniformity and there is every reason associated with federalism for local power to govern events locally that have only local impact." (*Pleasure Boating and Admiralty: Erie at Sea*, 51 Cal.L.R. p. 661)

Once again we see another commentator agreeing that when there is a complete lack of any "commercial" or "traditional maritime connection", as in the case at bar, then admiralty jurisdiction should be withheld.

This court's decision that, in this particular type of case, there is no admiralty jurisdiction, is further bolstered by several other cases. At first blush each of these other cases might seem to indicate that this court is in error. However, upon a close examination it can be readily determined that in each of the factual situations some quality of "commerce" or "traditional maritime activity" was connected with the accident.

In *Kaiser v. Travelers Insurance Co.*, 359 F.Supp. 90 (E.D. La.-1973), the connection was the fact that the water skier hit a sunken barge. In *Gele v. Chevron Oil Company*, 574 F.2d 243 (CA 5-1978), the connection was that the pleasure boat collided with a sunken barge. And finally, in two cases brought before this court, *Butler v. Amoco Production Company* (CA No. 74-94) and *Langlois v. Dow Chemical Com-*

pany (CA No. 78-402), we have extended admiralty jurisdiction to cases in which the only connection was that each of the pleasure boats involved struck a pipe anchored to an old drilling rig which was a few inches under the water level in a bayou.

As can be seen from each of these cited cases, there was some "commercial" or "traditional maritime" connection, regardless of how small, which, when coupled with the location of the accident, could properly invoke the admiralty jurisdiction of a federal court. However, in the case at bar no such minimal connection exists and, based on the guidelines of *Peytavin* and *Executive Jet*, admiralty jurisdiction cannot be properly extended, regardless of the location of the accident.

Just as the court in *Kelly v. Smith*, supra, set forth a non-exclusive list of factors to be considered, this court also finds such a listing to be helpful. When a court considers whether or not to extend admiralty jurisdiction to a case involving purely pleasure crafts, the following list offers some guidelines to aid in the admiralty jurisdiction question:

(1) Was the boat(s) involved being used for a purely pleasure type operation;

(2) Has the boat(s) involved ever been previously used in any type of commercial or maritime operation;

(3) Was the driver of the boat(s) under hire;

(4) Were any of the passengers under hire to perform any traditional maritime functions;

(5) Was there any instrumentality of commercial or maritime connection involved in any way with the accident;

(6) Are there any policy considerations involved which should encourage the court to find in favor of admiralty jurisdiction; and/or

(7) Are there any traditional concepts or modern applications of the role of admiralty which could be involved that would invoke admiralty jurisdiction.

The list is merely illustrative of the type of indepth analysis which a court should undertake before deciding whether or not admiralty jurisdiction is present in a particular case involving one or more purely pleasure boats. In the case at bar all of the answers to the aforementioned list are in the negative. Had any one of them been in the affirmative, then that fact, coupled with the location of the tort, might be sufficient to invoke the admiralty jurisdiction of the federal court.

From the Laws of Oleron to *Executive Jet* the role of "admiralty jurisdiction" has undergone many a metamorphosis. It will probably continue to do so. This court finds that one metamorphosis which must be recognized is that when an accident involving one or more vessels occurs on or in a navigable body of water and involves purely pleasure boats in which there is not the slightest scintilla of either "commercial" activity or "traditional maritime activity" involved, then the admiralty jurisdiction of the federal court should not be invoked.

Therefore, based on the foregoing factual and legal analysis it is the opinion of this court that plaintiff's claim cannot be maintained in admiralty. The plaintiff's suit will be dismissed.

Judgment will be entered accordingly.

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, AND CARLA RICHARDSON

VERSUS

CIVIL ACTION NUMBER 76-280

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER AND JUNE G. ALLEN

JUDGMENT

For written reasons assigned and filed in the record of this case:

IT IS ORDERED, ADJUDGED AND DECREED that this suit be, and it is hereby DISMISSED.

Baton Rouge, Louisiana, May 23, 1979.

/s/ E. Gordon West
United States District Judge

(Caption omitted in printing)

(Caption omitted in printing)

CIVIL ACTION

NUMBER 76-280

NOTICE OF APPEAL

Notice is hereby given that Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and arla Richardson, plaintiffs herein, hereby appeal to the United States Court of Appeal for the Fifth Circuit from the final judgment dismissing plaintiffs' case entered in this action on the 23rd day of May, 1979.

MAUGHAN, ATKINSON & MARTIN, LTD.
1755 Wooddale Boulevard
Baton Rouge, Louisiana 70806
Phone: (504) 926-8533

By: Roy Maughan

(Certificate omitted in printing)

(Caption omitted in printing)

CIVIL ACTION
NUMBER 76-200

NOTICE OF APPEAL

Notice is hereby given that June G. Allen, counter-claimant and defendant in the above matter, hereby appeals the United States Court of Appeals for the Fifth Circuit from the final judgment of the United States District Court for the Middle District of Louisiana entered in this action on the 23rd day of May, 1979. June 6, 1979.

By Attorneys:

TALBOT, SOTILE, CARMOUCHE,
WAGUESPACK & MARCHAND
P. O. Drawer 669
Donaldsonville, LA 70346

By: Victor L. Marcello

(Certificate omitted in printing)

Pansy F. RICHARDSON, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson, and Carla Richardson, Plaintiffs-Appellants-Cross Appellees,

v.

FOREMOST INSURANCE COMPANY, Shirley Eliser and June G. Allen, Defendants-Appellees,

June G. Allen, Defendant-Appellee-Cross Appellant.

No. 79-2542.

United States Court of Appeals, Fifth Circuit.

April 2, 1981.

Appeals from the United States District Court for the Middle District of Louisiana.

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

This is an appeal from the dismissal of plaintiffs' complaint on the ground that it did not state a cause of action that was within the admiralty jurisdiction of the lower court. The incident giving rise to the complaint involved a collision between two pleasure boats on the upper reaches of the Amite River. The district court, 470 F.Supp. 699, reasoned that the facts of the case did not present a sufficient relationship to traditional maritime activity to warrant the extension of admiralty jurisdiction to this litigation. While there is much logic and good sound policy reasons that support the district

court's holding, we regretfully conclude that precedent does not permit us to take this far-reaching step. Additionally, there is uniformity in the present rule that admiralty jurisdiction extends to all accidents occurring between surface vessels on navigable waters. The benefits derived from this certainly override the policy considerations advanced by the appellees in support of the district court's ruling.

The accident giving rise to this litigation was between one pleasure boat being used to pull a skier on a "zip sled" and a pleasure boat used for sporttfishing but under way at the time. Neither boat had ever been involved in commercial maritime activity. There was no involvement at the time of the accident of any buoy, barge, or underwater obstruction.

The district court concluded that there was a lack of admiralty jurisdiction and defined the issue as follows:

> In short, this case squarely presents the factual issue of whether or not "admiralty jurisdiction" must be extended to an accident occurring between two pleasure boats in the purest sense of the word, and in which there is absolutely no "commercial" or "traditional maritime activity" whatsoever involved.

The district court referred to the views of certain text writers in the field[1] and then examined and relied on three cases that unquestionably control the decision of this case, those being *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio,* 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972), *Kelly v. Smith,* 485 F.2d 520 (5th Cir. 1973), and *Peytavin v. Government Employees Insurance Co.,* 453 F.2d 1121 (5th Cir. 1972).

Those three cases very simply may be said to hold that

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1. Gilmore and Black, **The Law of Admiralty**, 2d ed., 1975; **Benedict on Admiralty**, 7th ed. (Revised); and, Boland and Dodd, **Recent Developments in the Law of Maritime Torts** (1972).

admiralty jurisdiction requires more than the occurrence of the tort on navigable waters — that additionally there must be a significant relationship between the wrong and traditional maritime activity. Thus, we agree with the district court in the statement of the rule. We differ from the district court in the application of the rule to the facts in this case.

We hold that two boats, regardless of their intended use, purpose, size, and activity, are engaged in traditional maritime activity when a collision between them occurs on navigable waters. We say this because boats, regardless of their size, purpose, and activity, are governed by the same "Rules of the Road" as the largest seagoing vessel when those boats are traversing navigable waters. As such, the owners and operators of the vessels are bound by those rules, and their negligent operation or absence of negligent operation is so governed. We do not find that any of the three cases which are our guideposts require that the maritime activity be an exclusively commercal one. We sympathize with those writers and scholars who strongly believe that admiralty jurisdiction should be limited to only litigation involving commercial activity on navigable waters. We recognize that the Fourth Circuitt in *Crosson v. Vance*, 484 F.2d 840 (4th Cir. 1973), holds otherwise than we do here. We note that the Eighth Circuit in *St. Hilaire Moye v. Henderson*, 496 F.2d 973 (8th Cir. 1974), has held that admiralty jurisdiction does extend to an accident identical to this. The Seventh Circuit in *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978), held that admiralty jurisdiction did not extend in that case because the once navigable waterway is now used only for recreational activities. In footnote 10 the court said: "The reach of admiralty jurisdiction over pleasure boat mishaps occurring in navigable waters used for commercial activity is, of course, not before us." 575 F.2d at 150, n. 10.

Our decision in this case is strongly influenced by the holding in *Kelly v. Smith, supra*, in which this court stated that "[a]dmiralty has traditionally been concerned with furnishing remedies for those injured while traveling navigable waters." *Id.* at 526. That case dealt with an unusual factual situation where gunfire was exchanged between occupants of a pleasure boat on the Mississippi River and persons standing on an island. The court placed emphasis on the danger presented by gunfire being directed at a vessel, although a small one, on a major commercial artery. We note a strong dissent in that case by Judge Morgan but believe that the facts in this case are more closely related to traditional maritime activities than those in the *Kelly* case because the rules governing navigation of all vessels govern the operation of the boats involved in the collision in this case.

If we were to hold that admiralty jurisdiction did not reach this litigation, we would be injecting an uncertainty that would plague litigants and the courts. For example, in the case of non-commercial navigators traveling on navigable waters that are shared by more than one state, their obligations and duties would be subject to differing standards depending on their precise location within the territorial jurisdiction of one state or another. Moreover, non-commercial navigators everywhere would be subject to yet another conflict in applicable standards of behavior depending upon whether their activity later turns out to be sufficiently "commercial," and, therefore, solely a matter for the states. Only a uniform admiralty law, extending to non-commercial as well as commercial navigators, avoids these problems.

We note additionally from the record that the place where the accident occurred is seldom, if ever, used for commercial activity. That does not cause us to vary from our holding. The waterway is not landlocked. It would be introducing an-

other note of uncertainty to hold that admiralty jurisdiction extends only to a stretch of navigable water that presently functions as a commercial artery. Jurisdiction should be a readily ascertainable as courts can make it. If the waterway is capable of being used in commerce, that is a sufficient threshold to invoke admiralty jurisdiction.

We remand to the district court for consideration of the case on the merits.

REVERSED and REMANDED.

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

Admiralty jurisdiction does not encompass actions in tort unless the wrong occurs on navigable waters and bears a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 93 S.Ct. 493, 34 L.Ed.2d 454 (1972); *Kelly v. Smith*, 485 F.2d 520 (5th Cir. 1973). The district court in this instance found it unnecessary to reach the navigable issue, since it found the "traditional maritime activity" criterion dispositive of the case. Although I am sympathetic with that court's conclusion that pleasure boating is not the stuff of which admiralty jurisdiction should be made, the question is no longer open for us to decide, since this Court has held that noncommercial activity does fall within the ambit of admiralty jurisdiction. *Kelly, supra.*

It is important to note, however, that the *Kelly* decision preserved a link (though certainly a weak one) with commercial activity that the majority in this case severs completely. The Court justified its decision in *Kelly* as follows:

> Rifle fire directed at a vessel, albeit a small one, *on a major commercial artery*, and injuring the

> pilot, presents sufficient danger *to maritime commerce* for the federal courts of admiralty to assume jurisdiction and to furnish remedies to those aboard the vessel and injured by that conduct.

Id. at 526 (emphasis added). In contrast, there is no hint in the case before us that the tort created a similar "danger to maritime commerce" and thus no trace of *any* federal interest at stake in this case. Because I believe that the desire for certainty cannot alone justify the assumption of federal control over matters of purely local concern, I would remand for a finding on whether the stretch of river where the accident occurred functions as an artery of commerce. *See Chapman v. United States*, 575 F.2d 147, 151 (7th Cir. 1978) (en banc); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975). Since the majority finds it unnecessary to answer this question, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79 2542

D. C. Docket No. CA 76 280

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, AND CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross-Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER AND JUNE G. ALLEN, JUNE G. ALLEN,
Defendants-Appellees,
Defendant-Appellee,
Cross-Appellant.

Appeal from the United States District Court for the Middle District of Louisiana

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby

remanded to the said District Court in accordance with the opinion of this Court.

IT IS FURTHER ORDERED that the defendants-appellees pay to the plaintiffs-appellants, the costs on appeal to be taxed by the Clerk of this Court.

APRIL 2, 1981

THORNBERRY, Circuit Judge, concurring in part; dissenting in part:

ISSUED AS MANDATE: May 14, 1981

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, CARLA RICHARDSON, and JUNE G. ALLEN,

Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,

Defendants-Appellee,

JUNE G. ALLEN,

Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 2, 1981, 5 Cir., 1981, 641 F.2d 314).

(May 4, 1981)

Before THORNBERRY, ANDERSON and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNITS A & B

No. 79-2542

PANSY F. RICHARDSON, DONALD B. RICHARDSON, PATRICK S. RICHARDSON, JOSEPH S. RICHARDSON, LARRY S. RICHARDSON, and CARLA RICHARDSON,
Plaintiffs-Appellants-
Cross Appellees,

versus

FOREMOST INSURANCE COMPANY, SHIRLEY ELISER and JUNE G. ALLEN,
Defendants-Appellees,

JUNE G. ALLEN,
Defendant-Appellee-
Cross Appellant.

Appeals from the United States District Court for the Middle District of Louisiana

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ON PETITION FOR REHEARING

(May 4, 1981)

Before THORNBERRY, ANDERSON, and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Received: May 6, 1981

CLERK's NOTE:

See Rule 41 FRAP and Local Rule 17 for Stay of the Mandate

SUPREME COURT OF THE UNITED STATES

No. 80-2134

Foremost Insurance Company, et al.,
Petitioners,

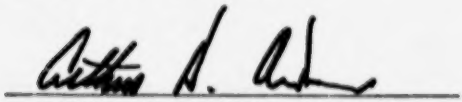
v.

Pansy F. Richardson, et al.

ORDER ALLOWING CERTIORARI. Filed October 5, 1981

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

Respectfully submitted,

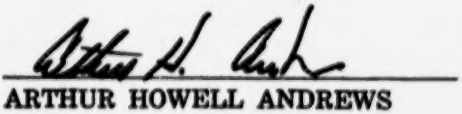


ARTHUR HOWELL ANDREWS
Attorney of Record
FRANKLIN, MOORE & WALSH
Post Office Box 3958
Baton Rouge, Louisiana 70821-3958

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Joint Appendix have been served on the Honorable Dorsey Martin, III, Maughan, Atkinson & Martin Ltd., 1755 Wooddale Boulevard, Baton Rouge, Louisiana 70806, counsel of record for respondents, Pansy F. Richardson, Donald B. Richardson, Patrick S. Richardson, Joseph S. Richardson, Larry S. Richardson and Carla Richardson, and on the Honorable Victor L. Marcello, Talbot, Sotile, Carmouche, Marchand & Marcello, Post Office Drawer 669, Donaldsonville, Louisiana 70346, counsel of record for June G. Allen by depositing said copies in the U.S. mail, postage prepaid, this 16 day of November, 1981.

I further certify that all parties required to be served have been served.



ARTHUR HOWELL ANDREWS